Petition

RECEIVED
NOV 9 1981
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1981, TERM

NO. 81-5687

FRANK COPPOLA,

Petitioner,

v.

WARDEN, VIRGINIA STATE PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

AUGUSTUS ANNINOS
J. GRAY LAWRENCE, JR.
Howell, Anninos, Daugherty & Brown
808 Maritime Tower
Norfolk, Virginia 23510
(804) 623-7334

COUNSEL

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
808 MARITIME TOWER
NORFOLK, VIRGINIA 23510

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
CITATION TO OPINION BELOW	2
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
A WRIT OF CERTIORARI SHOULD BE GRANTED SO THIS COURT MAY EXPLAIN THE SCOPE AND APPLICATION OF FOOTNOTE 8 OF HANKERSON V. NORTH CAROLINA: "THE STATES, IF THEY WISH, MAY BE ABLE TO INSULATE PAST CONVICTIONS BY ENFORCING THE NORMAL AND VALID RULE THAT FAILURE TO OBJECT TO A JURY INSTRUCTION IS A WAIVER OF ANY CLAIM OF ERROR" IN LIGHT OF THE RETROACTIVITY OF SANDSTROM V. MONTANA.	9
A. SANDSTROM SHOULD BE RETROACTIVELY APPLIED	9
B. PETITIONER'S CONVICTION WAS NOT "PAST" WHEN SANDSTROM WAS DECIDED	11
C. CERTIORARI SHOULD BE GRANTED TO EXPLAIN NOT ONLY WHAT IS A "PAST" CONVICTION FOR PURPOSES OF HANKERSON'S FOOTNOTE 8, BUT ALSO TO EXPLAIN THE CIRCUMSTANCES UNDER WHICH A STATE "MAY INSULATE" PAST CONVICTIONS THROUGH THE USE OF A CONTEMPORANEOUS-OBJECTION RULE	13
THE COMMONWEALTH OF VIRGINIA MAY NOT DEPRIVE PETITIONER OF THE RETROACTIVE APPLICATION OF SANDSTROM BY THE APPLICATION OF ITS CONTEMPORANEOUS OBJECTION RULE.	14
CONCLUSION	23
CERTIFICATE OF SERVICE	23

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

TABLE OF AUTHORITIES

Cases	Page
Ball v. Commonwealth, 221 Va. _____, _____ S.E.2d 221 VRR 762, 766-7 (January 16, 1981)	16
Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978)	19
Berger v. Commonwealth, 217 Va. 332, 228 S.E.2d 559 (1976)	15
Blackburn v. Thomas, _____U.S._____, 101 S.Ct. 1413, _____ L.Ed.2d _____(1981)	19
Breest v. Perrin, 495 F.Supp. 287, 291 (D.N.H. 1980)	21,22
Cole v. Stevenson, 620 F.2d 1055, 1063 ff. (4th Cir. 1980) cert. den. _____U.S._____, 101 S.Ct. 545, _____L.Ed.2d _____ reh. den. _____U.S. _____, 101 S.Ct. 932, _____ L.Ed. 2d _____	13,22
Cooper v. Commonwealth, 205 Va. 883, 889, 140 S.E.2d 688 (1965)	16
Coppola v. Commonwealth, 444 U.S. 1103, 100 S.Ct. 1069, L.Ed.2d 788	7
County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct.2213, 2221, 60 L.Ed.2d 743 fn. 8 (1979)	22
Dawkins v. Commonwealth, 186 Va. 55,62 41 S.E.2d 500 (1947)	15
Dietz v. Solem, 640 F.2d 126, 130 (8th Cir. 1981)	10
Glasgow v. Peatross, 201 Va. 43, 47, 109 S.E.2d 135 (1959)	16
Grace v. Butterworth, 635 F.2d 1, cert. den. 49 u.S.L.W. 3911 (1st Cir. 1980)	21,22
Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 2345, 53 L.Ed.2d 306 (1977)	1,8,9, 10,11, 12,13, 17,18, 20,21,
Hay v. Commonwealth, 139 Va. 578, 123 S.E. 333 (1924)	10

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Hinkle v. State,
290 N.W.2d 28 (1980) 21

Hodge v. Commonwealth,
217 Va. 338, 343, 228, 228 S.E.2d 692 (1976) 15

Holloway v. McElroy,
245 S.E.2d 658, 659 (1978), 632 F.2d 605, 614 Fn.
17 (5th Cir. 1980) cert. den. 49 U.S.L.W. 3881 18

Howard v. Commonwealth,
207 Va. 222, 228, 148 S.E.2d 200 (1966) 15

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 868
(1970) 9

Ivan V. v. City of New York,
407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972) 9,10

Johnson v. Commonwealth,
188 Va. 848, 855, 51 S.E.2d 152 (1949) 15

Jones v. Warden,
241 S.E.2d 914 (1978) cert. den. 439 U.S.
830, 99 S.Ct. 107, 58 L.Ed.2d 125 19,21

McCarthy v. Harper,
50 U.S.L.W. 3249 (Ninth Circuit) 17

McGuinn v. Crist,
492 F.Supp. 478, 480 (D. Mont. 1980) 22

Mackey v. United States,
401 U.S. 667, 675, 91 S.Ct. 1160, 1164,
28 L.Ed.2d 404 (1971) 12

Manley v. Commonwealth,
211 Va. 146, 176 S.E.2d 309, cert. den.
403 U.S. 936, 91 S.Ct. 2245, 29 L.Ed.2d
716 (1971) 15

Mullaney v. Wilbur,
421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508
(1975) 9,10,
11,13
15,18

Newlon v. City of Alexandria,
213 Va. 336, 193 S.E.2d 6 15

Nobles v. Commonwealth,
218 Va. 548, 551, 238 S.E.2d 808 (1977) 15

O'Connor v. Ohio,
385 U.S. 92, 87 C.T. 252, 253, 12 L.Ed.2d 189
(1966) 8,16

People v. Egan,
424 N.Y.S.2d 546, 549 (1980) 18

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
800 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Sandstrom v. Montana,
442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 — 1,7,8,9,10,11,12,14,15,17,18,20,21,22

State v. Allen,
424 A.2d 651 (1980) — 18

State v. Arroyo,
429 A.2d 457 (1980) — 18

State v. Fernandez,
628 P.2d 818, 825 (Wash. 1980), on remand 628 P.2d 827 (1981) — 18

State v. Harris,
383 So.2d 1 (1980) — 21

United States v. Frady,
636 F.2d 506 (D.C. Cir. 1980) — 19,21

Wainwright v. Sykes,
433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) — 21,22

Warlitner v. Commonwealth,
217 Va. 348, 349, 228 S.E.2d 698, cert. den. 430 U.S. 957, 97 S.Ct. 1604, 51 L.Ed.2d 807 (1976) — 15

Virginia Supreme Court Rules

Rule 3A:23(c) — 3
Rule 5:21 — 3,23

Virginia Statutes

§18.2-31 — 3
§18.2-31(d) — 10
§18.2-51 — 3,10
§19.2-264.3 — 6
§19.2-264.4 — 6

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1981, TERM

NO. 81-

FRANK COPPOLA,

Petitioner,

v.

WARDEN, VIRGINIA STATE PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Frank Coppola, prays that a writ of certiorari issue to review a judgment of the Supreme Court of the Commonwealth of Virginia affirming the judgment of the Circuit Court of the City of Newport News denying his petition for habeas corpus.

I. QUESTIONS PRESENTED FOR REVIEW

A. Whether Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, decided June 18, 1979, is retroactive so as to render unconstitutional an instruction, given at petitioner's trial on September 26, 1978, to the effect that: "The Court instructs the jury that a man is taken to intend that which he does or which is the natural and necessary consequence of his own act".

B. Whether petitioner's conviction, which was pending on direct review to the Virginia Supreme Court when Sandstrom was decided, is a "past conviction" which the Commonwealth may insulate from the retroactivity of Sandstrom pursuant to footnote 8, Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 2345, 53 L.Ed.2d 306 (1977).

C. Whether Hankerson, 97 S.Ct. 2345 fn. 8 authorizes the Commonwealth of Virginia to deny to petitioner the benefits of Sandstrom's retroactivity based upon the application of a contemporaneous objection rule which, by its own terms, allows the Court to review errors not raised at trial "for good cause

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

shown or to attain the ends of justice" and in view of the power of the Court to notice and correct plain error, even though not identified at trial.

II. CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia affirming the circuit court's dismissal of his petition for state habeas corpus is reported in Coppola v. Warden, Virginia State Penitentiary, 222 Va. _____ , _____ S.E.2d ____, 222 VRR 329 (1981). That opinion is set out in the appendix hereto, pp.25, infra. The order accompanying the opinion appears at page 30 of the appendix. The order of the Circuit Court of the City of Newport News dated April 29, 1980, from which petitioner took his appeal to the Supreme Court of Virginia is exhibited at page 31 of the appendix. The order of the Supreme Court of Virginia granting the petition for appeal dated January 16, 1981, is set out at page 32 of the appendix.

III. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This petition seeks a writ of certiorari to the order of the Supreme Court of Virginia dated September 11, 1981. No order has been entered respecting a rehearing nor granting an extension of time within which to petition for certiorari. This Court should invoke its jurisdiction to consider this petition for writ of certiorari pursuant to Rule 17(b) and (c), Rules of the Supreme Court, in that the Supreme Court of Virginia has decided a federal question in a way which conflicts with the decision of other state courts of last resort or federal courts of appeals, and has decided an important question of federal law which has not been but should be, settled by this Court, and has decided a federal question in a way in conflict with applicable decisions of this Court.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the

LAW OFFICES OF
HOWELL, ASHINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Constitution of the United States, as well as the following provisions of the Code of Virginia and Rules of the Virginia Supreme Court:

Va. Code §18.2-31

Capital murder defined; punishment.

The following offenses shall constitute capital murder, punishable as a Class 1 felony:

. . .

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

. . .

Va. Code §18.2-51

Maiming.

If any person maliciously shoot, stab, cut, or wound any person or by any means cause his bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Rule 5:21 - Rules of the Supreme Court of Virginia

Form and Contents of Petition for Appeal; Assignments of Error; Objections in Trial Courts; Effect of Failure to Assign Error. - The petition for appeal shall contain assignments of error and, except in the case of an appeal from the State Corporation Commission, the form, contents and length of the petition for appeal shall conform in all respects to the requirements of the appellant's opening brief. Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. An assignment of error which merely states that the judgment is contrary to the law and the evidence is not sufficient.

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
800 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Rule 3A:23(c) - Rules of the Supreme Court of Virginia

> Objections. Before instructing the jury, the court shall advise counsel of the instructions to be given and shall give counsel the opportunity to make objections thereto. Objections shall be made out of the presence of the jury, and before the court instructs the jury unless the court grants leave to make objections at a later time.

V. STATEMENT OF THE CASE

In May, 1978, Coppola was charged with the capital murder of Muriel Hatchell (as defined in Va. Code §18.2-3(d): "the willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon"); two counts of robbery of Mrs. Hatchell and her husband, Peyton Hatchell; one count of maiming Mr. Hatchell; and one count of possession of a firearm in the commission of a felony, all alleged to have occurred on April 27, 1978, in Newport News, Virginia. Coppola's trial began September 19, 1978.

The evidence at the trial showed that in April, 1978, Coppola; his wife, Karen; Joseph E. Miltier and Donna Mills drove to the Hatchell home in Newport News from Portsmouth, Virginia. Coppola was to gain entrance to the home disguised as a priest, the ostensible aim being to rob the Hatchells. Mrs. Hatchell, however, refused to admit Coppola. (Tr. 428-430). (References in this Statement of Facts to transcript page numbers are to the transcript of Coppola's trial in the Circuit Court of Newport News between September 19 and September 26, 1978.) Several days later, on April 22, 1978, the group went again to the Hatchell residence in a car rented by Mills, at Miltier's direction (Tr. 430). The group left Mills at a street corner near the Hatchell

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
ORFOLK, VIRGINIA 23510

home, from whence she proceeded to the Hatchell residence. Mills, who was carrying roses purchased at the direction of Miltier (Tr. 435), knocked on the door, which Mrs. Hatchell opened. She and Mills became involved in a scuffle, whereupon Coppola and Miltier entered. Mills, who had previously been given a revolver by Coppola, returned the weapon to him when he entered the house (Tr. 450-451). That weapon, together with the automatic pistol apparently being carried by Miltier, were recovered by Newport News police two days later from the car in which Miltier and two other persons originally charged in the case were seated when arrested, after following Mills to the car rental agency to return the vehicle (Tr. 407-408, 591 ff). This is all the evidence introduced relating to Coppola's possession or use of a firearm during or after the robbery. Mrs. Hatchell was bound, questioned and threatened as to the whereabouts of money. Although the Virginia Supreme Court, in its first opinion, construed the evidence so as to say that Coppola "struck Mrs. Hatchell in the face and repeatedly beat her head against the floor," Miltier admitted to Mills that his blows, not Coppola's caused Mrs. Hatchell's death (Tr. 524). Dr. Presswalla, the medical examiner, testified that death was caused by cumulative blows to the head, complicated by aspiration. It was impossible for the Commonwealth to prove who delivered which blows and which blows, as opposed to others, caused the death (Tr. 375). Mills pleaded guilty to capital murder, thus admitting that she also participated as an "immediate perpetrator" of Mrs. Hatchell's death, Va. Code §18.2-18. Mr. Hatchell was bound. He, too, was asked the location of any money in the house. He implored his wife to tell the robbers if she knew, but she refused (Tr. 325, 453). The Newport News police retrieved two bullets from the Hatchell home, both fired from the automatic pistol carried by Miltier (Tr. 397, 401, 405, 724). Mr. Hatchell identified

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Miltier as the man who had struck him in the head with a gun as he entered the home at approximately 6:00 p.m. (Tr. 334). Mills admitted taking rings from Mrs. Hatchell's fingers (Tr. 472). Some $3,100 was taken from Hatchell; when Miltier was arrested, there was found on his person $2,250 (Tr. 326) bound with a rubber band (the manner in which Hatchell testified he was carrying that sum when it was taken from him [Tr. 326]) and several hundred dollars in his left front pocket (Tr. 326). The group fled in Hatchell's automobile to rendevous with Coppola's wife, who was waiting nearby in the rental car. Hatchell freed himself and called for help. By the time it arrived, Mrs. Hatchell was dead.

Coppola denied any involvement in the crimes and produced various witnesses in support of an alibi defense. Mr. Hatchell was unable to identify him as one of the assailants.

Coppola's trial lasted until September 26, 1978. At the conclusion of all the evidence at the guilt phase of the trial the Commonwealth asked for and received, among other instructions, Instruction No. 9, which told the jury that "a man is taken to intend that which he does or which is the natural and necessary consequence of his own act." The jury returned a verdict of guilty on all counts and sentenced Coppola to life terms on each of the robberies, twenty years on the maiming count and one year on the count of use of a firearm in the commission of a felony. Pursuant to Va. Code §§19.2-264.3 and 19.2-264.4, the jury then heard evidence bearing on the penalty to be given on the capital murder conviction.

It recommended that Coppola receive the death sentence, having found that "the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim" (Tr. 1254). Sentences were imposed by the trial court in accordance with the verdicts of the jury.

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
800 MARITIME TOWER
ERFOLK, VIRGINIA 23510

Coppola's execution was last scheduled for December 18, 1981, but has been stayed by the Virginia Supreme Court pending the filing of this petition and this Court's consideration of it.

VI. HOW THE FEDERAL QUESTION WAS RAISED AND PRESENTED BELOW

Coppola's trial occurred between September 19 and September 26, 1978. Judgment was entered according to the verdict and recommendation of the jury on October 27, 1978. Thereafter, Coppola availed himself of the automatic review procedures established by Virginia statute for review of his capital murder conviction and death sentence and also filed a petition for appeal with respect to the non-capital felonies. Briefs had been filed and argument had in both cases when, on June 18, 1979, this Court announced its opinion in Sandstrom v. Montanna, supra, holding unconstitutional an instruction that "the law presumes that a person intends the ordinary consequence of his voluntary acts." On August 30, 1979, the Supreme Court of Virginia, not then confronted with the Sandstrom issue, affirmed petitioner's convictions and sentences, including his sentence of death. Rehearings were denied on October 5, 1979, and Coppola then filed a petition for writ of certiorari to this Court, seeking review of those matters raised on his appeal to the Virginia Supreme Court, all of which were decided adversely to him. That petition was denied by order of February 19, 1980, Coppola v. Commonwealth, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788. Coppola then filed a state habeas corpus petition contending, among other allegations, that the Commonwealth's Instruction No. 9 was unconstitutional under Sandstrom because it was inconsistent with the presumption of innocence, invaded the fact-finding province of the jury and shifted the burden of proof to him on the issue of intent. The Circuit Court ruled, in an order dated April 29, 1980, that the petition for habeas

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
606 MARITIME TOWER
NORFOLK, VIRGINIA 23510

corpus was "wholly without merit and accordingly is hereby denied". Petitioner then filed a petition for appeal to the Supreme Court of Virginia, alleging error on the part of the trial court on various grounds including, but not limited to, the effect of Sandstrom on Instruction No. 9. On January 16, 1981, the Supreme Court granted the petition for appeal but limited it to the following four questions:

(1) Whether Instruction No. 9 falls within the ambit of instructions prohibited by Sandstrom v. Montanna, 442 U.S. 510 (1979).

(2) Whether Sandstrom should be applied retroactively.

(3) Whether counsel's failure to object to Instruction No. 9 at trial or on direct review should bar the petitioner's present challenge to that Instruction through a habeas petition. Rule 5:21; compare Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977), with O'Connor v. Ohio, 385 U.S. 286 (1966).

(4) Whether the granting of Instruction No. 9 was harmless error.

Those questions were briefed and argued by the petitioner before the Supreme Court of Virginia. In his brief, he also argued, in support of his contention that his counsel's failure to object to the giving of the instruction did not constitute a waiver of his right to challenge the instruction on constitutional grounds, that a waiver of his right to object was inconsistent with the retroactivity which should be accorded to Sandstrom; that the "good cause" and "to attain the ends of justice" exception to Virginia's contemporaneous objection rule had been applied in capital cases, criminal cases where the death penalty was not involved, and even in civil cases, and should be applied by the Virginia Supreme Court to his case, and that that Court's failure or refusal to apply it was irreconcilable with

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

those caes in which it had been applied and arbitrary; and that Coppola's conviction was not "final" when Sandstrom was announced, and therefore its ruling should inure to his benefit, Hankerson v. North Carolina, supra, fn. 8. In a per curiam opinion, the Supreme Court of Virginia affirmed the judgment of the Circuit Court denying the habeas corpus petition, holding that the failure of Coppola's counsel to object to the giving of Instruction No. 9 at trial or on direct appeal worked a waiver of his right to rely on Sandstrom and citing, in support of its decision, Hankerson, supra, fn. 8.

VII. REASONS FOR GRANTING THE WRIT

A WRIT OF CERTIORARI SHOULD BE GRANTED SO THIS COURT MAY EXPLAIN THE SCOPE AND APPLICATION OF FOOTNOTE 8 OF HANKERSON V. NORTH CAROLINA: "THE STATES, IF THEY WISH, MAY BE ABLE TO INSULATE PAST CONVICTIONS BY ENFORCING THE NORMAL AND VALID RULE THAT FAILURE TO OBJECT TO A JURY INSTRUCTION IS A WAIVER OF ANY CLAIM OF ERROR" IN LIGHT OF THE RETROACTIVITY OF SANDSTROM V. MONTANA.

A. SANDSTROM SHOULD BE RETROACTIVELY APPLIED

On his most recent appeal to the Supreme Court of Virginia, petitioner contended that Instruction No. 9 was unconstitutional under Sandstrom v. Montana, supra (where this Court struck down on due process grounds an instruction that "the law presumes that a person intends the ordinary consequence of his voluntary act"), and that Sandstrom, like its predecessors, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) was fully retroactive, Ivan V v. City of New York, 407, U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977). Sandstrom, after all, declared that "(i)t is the line of cases urged by petitioner, and exemplified by In re Winship (citation omitted) that provides the appropriate mode of constitutional analysis for these kinds of presumptions," 99 S.Ct. at 2457. His contentions

LAW OFFICES OF
IOWELL, ANNINOS,
DAUGHERTY &
BROWN
900 MARITIME TOWER
RFOLK, VIRGINIA 23510

in this regard were not seriously disputed by the Commonwealth of Virginia. Indeed, Dietz v. Solem, 640 F.2d 126, 130 (8th Cir. 1981) has explicitly held that Sandstrom is to be applied retroactively. Sandstrom would apply to all petitioner's convictions where intent is an element of the crime, i.e., capital murder, Va. Code §18.2-31(d); robbery, Pierce v. Commonwealth, 205 Va. 528, 532, 138 S.E.2d 28 (1964); and maiming, Va. Code §18.2-51, Hay v. Commonwealth, 139 Va. 578, 123 S.E. 333 (1924).

Mullaney, supra, involved an instruction on a presumption of implied malice aforethought which required the defendant to prove that he had acted in the heat of passion or on sudden provocation in order to reduce murder to manslaughter. This Court in Mullaney had ruled that the presumption operated to affirmatively shift to the defendant the burden of proof on an essential element of the crime of murder. Mullaney was given complete retroactive effect in Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977). At issue in Hankerson was an instruction that if the state proved beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon, the law raised a presumption that the killing was unlawful and that it was done with malice, and that in order to excuse his act the defendant had to prove to the jury's "satisfaction" that he acted in self defense. The defendant had been convicted of second degree murder prior to the Mullaney decision. The North Carolina Supreme Court affirmed, refusing to give retroactive application to Mullaney because of what it perceived would be a devastating impact on the administration of justice. This Court reversed, holding that the case was controlled by Ivan V, supra, but at fn. 8 declared:

> Moreover, we are not persuaded that the impact on the

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

> administration of justice in those States that utilize the sort of burden-shifting presumption involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g. Fed. Rule Crim. Proc. 30.

B. PETITIONER'S CONVICTION WAS NOT "PAST" WHEN SANDSTROM WAS DECIDED

Footnote 8 of Hankerson speaks in terms of the states' insulation of "past" convictions from the retroactive sweep of the Mullaney decision, even though Hankerson was pending on direct review when Mullaney was decided. What is a "past" conviction is not defined in the footnote or elsewhere in the opinion. The question of what is a "past" conviction is separate from the effect of a procedural waiver, treated elsewhere in this petition, for unless a conviction is "past", according to footnote 8, one need not worry about such a waiver. Retroactive application, by definition, speaks from the day the new decision is announced. Obviously, after it is announced, it becomes the law of the land. Thus, the initial question is whether Coppola's conviction was "past" when Sandstrom was decided on June 18, 1979. The logical interpretation of "past" as used in footnote 8, in view of the finality concerns which apparently prompted it, is "final". This interpretation is buttressed when the majority opinion is read in conjunction with the concurring opinions of Mr. Justice Marshall and Mr. Justice

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Powell in Hankerson espousing the rule of retroactivity advocated by Mr. Justice Harlan in Mackey v. United States, 401 U.S. 667, 675, 91 S.Ct. 1160, 1164, 28 L.Ed.2d 404 (1971). There, as Mr. Justice Powell explained it, the benefits of a new ruling would extend to cases pending on direct review at the time the ruling was made; cases on collateral review would be considered in light of the law as it stood when the conviction became final. Hankerson, supra at 2347-2348. While this position was rejected by the majority of the Hankerson Court in favor of complete retroactivity, it does serve to throw light, counsel believes, on the point in time when--the majority, Justice Powell and Justice Marshall seemingly agree--retroactive application may be accorded a ruling without concerns over a procedural waiver--before the conviction becomes "final". The petitioner's conviction was not final until this Court denied certiorari on February 19, 1980. Thus, when petitioner's conviction became final Sandstrom was the law of the land and under footnote 8 or the views espoused by Justices Powell and Marshall, petitioner should be accorded the retroactive benefit of Sandstrom.

The next question becomes, if a conviction is not "past" when a new ruling is announced, must the error based upon the new ruling, be raised prior to the conviction becoming final or may it be raised afterward, in a collateral review proceeding. Footnote 8 did not attempt to set out the factual situations in which the states might insulate final convictions from retroactive application of a ruling through the use of contemporaneous-objection rules. One such factual situation is presented by this case, where although Coppola's conviction was not final when Sandstrom was announced, the error in the jury instruction which Sandstrom declared was not raised until after his conviction was final. If a state may insulate only convictions which are final at the time a decision is announced,

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

there would seem to be no reason for requiring that the error retroactively revealed by such decision be brought to the court's attention prior to the time the conviction becomes final.

C. CERTIORARI SHOULD BE GRANTED TO EXPLAIN NOT ONLY WHAT IS A "PAST" CONVICTION FOR PURPOSES OF HANKERSON'S FOOTNOTE 8 BUT ALSO TO EXPLAIN THE CIRCUMSTANCES UNDER WHICH A STATE "MAY INSULATE" PAST CONVICTIONS THROUGH THE USE OF A CONTEMPORANEOUS-OBJECTION RULE

This Court should grant certiorari to explain, not only what is a "past conviction" within the meaning of Hankerson's Footnote 8, but also to explain under what circumstances "(t)he States, if they wish, may be able to insulate past convictions . . ." As was pointed out in a thoughtful dissent by Justice Murnaghan, joined by Chief Judge Haynsworth and Winter, in Cole v. Stevenson, 620 F.2d 1055, 1063 ff. (4th Cir. 1980) cert. den. _____ U.S. _____, 101, S.Ct. 545, _____ L.Ed.2d _____, reh. den. ____ U.S. _____, 101 S.Ct. 932, ____ L.Ed.2d _____, footnote 8 was only dictum as far as the Hankerson ruling was concerned. When footnote 8 of Hankerson is read in conjunction with the concurring opinions of Justice Powell and Justice Marshall, the footnote's real significance becomes its confirmation that the majority of this Court declined to adopt a principle of limited retroactivity for Mullaney, id. at 1067. It is pointed out that the holding of complete retroactivity of Hankerson cannot be reconciled with the dictum of footnote 8, and in such event, it is the dictum which must yield, id. at 1068. Judge Murnaghan also noted, id. at 1067, that in Hankerson's footnote 8:

> The Supreme Court was not vetting the procedure of invoking the contemporaneous-objection rule in advance. It was not holding that it would, when actually presented with the issue, allow a state to bar the assertion of a newly established, but fully retroactive, constitutional right on the grounds that

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
900 MARITIME TOWER
NORFOLK, VIRGINIA 23510

> the point had not been preserved by objection at trial. It was saying "maybe", or "perhaps in some cases but not in others" . . .

Footnote 8, he continued, id. at 1068-1069:

> . . .is no more than a tentative, prayerful suggestion as to a technique which the states might employ, with no guarantee that, once they had tried it, the Supreme Court would, on full consideration of each individual case, uniformly agree that it was appropriate. The dictum no doubt reflected uneasiness about the suggested large burden deriving from all those terminated cases which would have to be reopened and retried. The dictum does not purport to address all the myriad factual settings in which the effect or failure to object in a state court on the right to raise Mullaney would be an issue.

It is critical that this Court amplify footnote 8. Utilizing it, the Virginia Supreme Court held that Coppola will forfeit his life on December 18 of this year because his counsel failed to object to Commonwealth's Instruction No. 9, despite the clear unconstitutionality of that instruction in light of Sandstrom. This is a preposterous result which this Court should not tolerate.

> THE COMMONWEALTH OF VIRGINIA MAY NOT DEPRIVE PETITIONER OF THE RETROACTIVE APPLICATION OF SANDSTROM BY THE APPLICATION OF ITS CONTEMPORANEOUS OBJECTION RULE.

Rule 5:21, Rules of the Supreme Court of Virginia, on which the Supreme Court of Virginia relied in dismissing petitioner's habeas corpus petition, reads in pertinent part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

The last phrase of the portion of Rule 5:21 just quoted was entirely ignored by the Virginia Supreme Court. Coppola's trial ended September 26, 1978. This case had been briefed and argued

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

and was awaiting a decision by the Virginia Supreme Court when Sandstrom was decided. The fact that no objection to Instruction No. 9 was made on appeal to the Virginia Supreme Court, as opposed to trial, is immaterial, since that Court refuses to consider on appeal objections not made at trial, Rule 3A:23(c); Newlon v. City of Alexandria, 213 Va. 336, 193 S.E.2d 6; Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309, cert. den. 403 U.S. 936, 91 S.Ct. 2245, 29 L.Ed.2d 716 (1971); Berger v. Commonwealth, 217 Va. 332, 228 S.E.2d 559 (1976).

The presumption of intended consequences contained in Instruction No. 9 has been approved in Virginia for more than 100 years, Johnson v. Commonwealth, 188 Va. 848, 855, 51 S.E.2d 152 (1949). The rule has been often reiterated, see e.g., Howard v. Commonwealth, 207 Va. 222, 228, 148 S.E.2d 200 (1966); Dawkins v. Commonwealth, 186 Va. 55, 62, 41 S.E.2d 500 (1947). It was again enunciated by the Virginia Supreme Court in Nobles v. Commonwealth, 218 Va. 548, 551, 238 S.E.2d 808 (1977), a case decided almost two and a half years after Mullaney. Johnson v. Commonwealth, supra, 188 Va. at 854-855, had likened the presumption of intended consequences to the presumption that every unlawful homicide is murder in the second-degree and that a prima facie case of first-degree murder is made out by showing a mortal wound made with a deadly weapon. The presumption of murder in the second-degree was approved in Hodge v. Commonwealth, 217 Va. 338, 343, 228 S.E.2d 692 (1976); the presumption of malice from the use of a deadly weapon was approved in Warlitner v. Commonwealth, 217 Va. 348, 349, 228 S.E.2d 698, cert. den. 430 U.S. 957, 97 S.Ct. 1604, 51 L.Ed.2d 807 (1976). Both decisions were rendered in light of Mullaney. Thus, despite Mullaney, there was at the time of petitioner's trial no decision of the Virginia Supreme Court to contravene the statement of the trial judge in granting Instruction 9: "I

LAW OFFICES OF
OWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
RFOLK, VIRGINIA 23510

don't think there's any question about that being the law." The instruction was a standard one which in similar form appeared (and still does) in Virginia Jury Instructions, the State's standard jury instruction manual, §118.15. If the Commonwealth, the trial court and the Virginia Supreme Court did not anticipate that it would be held unconstitutional, Coppola could not be expected to do so, O'Connor v. Ohio, 385 U.S. 92, 87 S.Ct. 252, 253, 12 L.Ed.2d 189 (1966). Nevertheless, Coppola's counsel referred to Mullaney in commenting on another, later instruction, and remarked: "I don't think it (sic) ought to be any presumption against. . . any defendant. . ." The trial court replied, " I think that's the law in the Commonwealth, the United States Supreme Court notwithstanding." Coppola's counsel conceded it was the law, but he did not agree with it (Tr. 1041-1042).

The exception to Rule 5:21 "for good cause shown or to enable this Court to attain the ends of justice" was applied in Cooper v. Commonwealth, 205 Va. 883, 889, 140 S.E.2d 688 (1965), a case of rape, where the Virginia Supreme Court considered the admissibility of a statement made to police officers by defendant on the ground that he was denied the right to assistance of counsel at the time it was obtained, and despite his failure to object to it as the trial or to assign specific error with regard to it on appeal. In doing so, the Court recognized its power to review and correct fundamental error even though no objection to such error was made at the trial or assigned on appeal. The exception to Rule 5:21 was recently applied in a case of capital murder, Ball v. Commonwealth, 221 Va. _____, _____ S.E.2d _____ 221 VRR 762, 766-7 (January 16, 1981). The exception has even been applied in civil cases, one of which involved an instruction which was "hopelessly confusing and meaningless," Glasgow v. Peatross, 201 Va. 43, 47, 109 S.E.2d 135 (1959). It is

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
800 MARITIME TOWER
NORFOLK, VIRGINIA 23510

impossible to reconcile the cases in which the Court has applied the exception to those in which it has not. Hankerson's footnote 8 provides no protection against the haphazard, uneven treatment by state courts of a federal constitutional right which this Court has found so essential to a fair trial that it has made it retroactive; in fact, it encourages such treatment.

Granted, a state court's interpretation and utilization of its contemporaneous objection rules probably does not, in most cases, raise a constitutional question. It does in this case because of the presence of fn. 8 of Hankerson, the arbitrary and unequal utilization of Rule 5:21 to bar petitioner's constitutional claim, and the irreconcilable stances taken by various state and federal courts in the use of contemporaneous objection rules to bar retroactive application of Sandstrom or its predecessors.

Here, the trial court did not deny petitioner's habeas corpus petition on the grounds that his counsel had failed to adhere to Rule 5:21. The order simply recited that the petition was wholly without merit and denied the same, a ruling which constitutes a ruling on the merits, McCarthy v. Harper, an unreported case arising out of the Ninth Circuit. There, it was held that a denial of a petition for habeas corpus without opinion or citation constituted a denial on the merits. Certiorari was denied by this Court on October 5, 1981, No. 80-1626, 50 U.S.L.W. 3249. Again in this case, the Virginia Supreme Court, in granting Coppola's petition for appeal, directed Coppola to address himself not only to the waiver of Sandstrom through his counsel's failure to object, but also whether the Commonwealth's Instruction No. 9 fell within the ambit of instructions prohibited by Sandstrom, whether Sandstrom should be applied retroactively and whether the granting of Instruction No. 9 was

LAW OFFICES OF
OWELL, ANNINOS,
DAUGHERTY &
BROWN
800 MARITIME TOWER
FOLK, VIRGINIA 23510

harmless error. Obviously, the Virginia Supreme Court did more than refuse to hear petitioner because of Rule 5:21. It asked for, and received, briefs on the federal questions involved. Argument was presented to the Court on those federal issues.

Aside from Virginia's interpretation of its own Rule 5:21, courts in other states are polarized over the use of the contemporaneous objection rule to bar challenges to jury instructions under Sandstrom and Mullaney, a polarization that, unfortunately, was aided and abetted by footnote 8 of Hankerson.

As Hankerson itself noted, 97 S.Ct. at 2343, the North Carolina Supreme Court passed on the validity of the instruction given in Hankerson's case, even though he had not objected to it at trial. In Mullaney, supra, the Maine Supreme Judicial Court considered the jury charges on appeal even though no objection was made to them at trial because of their "constitutional implications", 95 S.Ct. at 1884. The Georgia Supreme Court granted an application to review the denial of a state habeas corpus petition involving a burden-shifting charge on justification in a conviction of voluntary manslaughter because the issue involved law developed after petitioner's trial, Holloway v. McElroy, 245 S.E.2d 658, 659 (1978), 632 F.2d 605, 614 fn. 17 (5th Cir. 1980) cert. den. 49 U.S.L.W. 3881. In State v. Fernandez, 628 P.2d 818, 825 (Wash. 1980), on remand 628 P.2d 827 (1981), a challenge to an instruction on Sandstrom grounds was reviewed as fundamental error despite counsel's failure to object to the instruction at trial. The same rationale was applied in two Connecticut cases, State v. Arroyo, 429 A.2d 457 (1980) and State v. Allen, 424 A.2d 651 (1980). New York declared a presumed intent instruction unconstitutional under Sandstrom, decided after the defendant's trial, even though no objection was made to it in the trial court," in the interest of justice," People v. Egan, 424 N.Y.S.2d 546, 549 (1980). The

LAW OFFICES OF
OWELL, ANNINOS,
DAUGHERTY &
BROWN
500 MARITIME TOWER
FOLK, VIRGINIA 23510

West Virginia Supreme Court was invited to dispose of a challenge to an instruction that "(t)he Court instructs the jury that the law is that a man is taken to intend that which he does, or which is the natural and necessary consequences of his own act . . ." by using a contemporaneous objection rule in Jones v. Warden, 241 S.E.2d 914 (1978), cert. den. 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed.2d 125. That case, as this one, was a proceeding to collaterally review a murder conviction. That Court declared, id. at 916:

> But we decline to use that method (applying a contemporaneous-objection rule) of insulating past criminal convictions from the ambit of Mullaney, Pendry (State v. Pendry, 227 S.E.2d 210 [1976]) and Hankerson. Safeguarding the integrity of the fact-finding process must take priority over procedural concerns such as whether a trial lawyer could perceive future United States Supreme Court rulings and object to acts or instructions on the basis of constitutional infirmities yet unborn. (Parenthetical material supplied.)

In a case in which this Court recently granted certiorari, the Louisiana Supreme Court reviewed the merits of petitioner's habeas corpus claim under Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), despite his failure to object to the alleged error at trial, Blackburn v. Thomas, _____ U.S. _____, 101 S.Ct. 1413, _____ L.Ed.2d _____ (1981). United States v. Frady, 636 F.2d 506 (D.C. Cir. 1980) involved convictions of first degree murder and robbery in a United States District Court. The convictions were affirmed by the District of Columbia Circuit, 348 F.2d 84, and certiorari was denied by this Court, 382 U.S. 909, 86 S.Ct. 246, 15 L.Ed.2d 160 (1965). After filing numerous motions to reduce his sentence, Frady then filed a federal habeas corpus petition alleging that a jury instruction given at his 1963 trial was defective and denied him a fair trial. The Circuit Court of Appeals reviewed the instructions, one defining murder and manslaughter and equating specific intent

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

with malice, the other telling the jury that "the law infers or presumes from the use of such weapon in the absence of a explanatory or mitigating circumstances the existence of malice essential to culpable homicide" in light of two of its own decisions pronounced after petitioner's trial, one in 1968, the other in 1974. It did not reach the Sandstrom issue, id. at 509 fn. 7. Although no objection to the instructions had been made at trial, the Court compared Rule 30 of the Federal Rules of Criminal Procedure ("no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict") with Rule 52(b) ("plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court") and concluded that the error in the granting in the instructions could be reviewed as plain error. The Court noted that, at the time the offending instructions were given at petitioner's trial, they were standard and his counsel thus had every right to believe that an objection to them would have been futile, id. The Court observed:

> To rule otherwise would be to suggest that trial counsel should object to all jury instructions in anticipation of changes in the constitutionality of jury instructions. Such a suggestion borders on the absurd.

In a footnote, the court noted that its ruling was not inconsistent with footnote 8 of Hankerson. Because a federal, and not a state, prisoner was involved, there were not the concerns of comity and federalism present. Secondly, under the Federal Rules of Criminal Procedure, failure to object to jury instructions at trial only had the effect of changing the standards of review to "plain error", id. at 514 fn. 19. Coppola submits that, as between comity/federalism and a federal constitutional right, the latter must prevail. This is especially true in light of the fact that the states themselves

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

are in disagreement how, and to what extent, their contemporaneous objection rules should be used to bar retroactive application of a constitutional decision.

This Court has granted certiorari to review Frady, 49 U.S.L.W. 3968 (June 29, 1981), considering, among other matters, whether the plain error standard governs the availability of collateral relief regarding the erroneous jury instruction to which no objection was made at trial.

Arrayed against the jurisdictions which have chosen not to utilize their contemporaneous objection rules to bar Sandstrom-type challenges are the following. Footnote 8 of Hankerson was relied on in Breest v. Perrin, 495 F.Supp. 287, 291 (D.N.H. 1980) to bar a habeas corpus challenge to a reasonable doubt jury instructions based on a First Circuit ruling occurring five years after the trial. Other states are Massachusetts, see Grace v. Butterworth, 635 F.2d 1, cert. den. 49 U.S.L.W. 3911 (1st Cir. 1980); Iowa, Hinkle v. State, 290 N.W.2d 28 (1980); and Louisiana, State v. Harris, 383 So.2d 1 (1980). The different attitudes courts have taken to the invitation of Hankerson's footnote 8 may be seen by comparing the language quoted from Jones v. Warden, supra, with the following language in Hinkle v. State, supra at 35:

> But even the Hankerson court noted retroactivity may be nullified by "the normal and valid rule that failure to object to an instruction is a waiver of any claim of error".

The question here presented on the scope and applicability of Hankerson's footnote 8 is one which needs to be decided. State rulings pro or con the contemporaneous-objection rule inevitably find their way into federal habeas corpus proceedings where the federal courts are then called upon to determine whether or not a failure to object fits the "cause" and "prejudice" exceptions to the rule of Wainwright v. Sykes, 433

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Here again, varying results have been reached in part because federal courts, in determining Wainwright "cause," look at the state determination as to whether or not a habeas corpus petitioner complied with a contemporaneous objection rule. For those states which refuse to permit such a rule to bar the assertion of a constitutional claim, Wainwright never comes up in a federal habeas corpus proceeding. On the other hand, in a state where the rule is invoked to bar such a claim, the result may be the dismissal of the federal petition without any examination on the merits. So in County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct.2213, 2221, 60 L.Ed.2d 743 fn. 8 (1979) a New York contemporaneous-objection rule in which the Appellate Division of the New York Supreme Court was authorized in its discretion to "consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant", even if not previously objected to was said to be a "carefully limited" rule not foreclosing a habeas corpus petition in the federal courts. In McGuinn v. Crist, 492 F.Supp. 478, 480 (D. Mont. 1980) it was contended that the petitioner's failure to object to the giving of a Sandstrom instruction at the trial barred review in a federal habeas corpus proceeding. The district court noted, however, that under the applicable Montanna statute, "defects affecting . . . constitutional rights may be noticed although they were not brought to the attention of the trial court." The Court concluded, "(t)hus, the state's interest in its contemporaneous objection policy is not compelling and will not bar this Court on habeas corpus."

On the other side are cases like Grace v. Butterworth, supra, Breest v. Perrin, supra, and Cole v. Stevenson, supra. In the latter case, however, North Carolina procedural rules required

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
600 MARITIME TOWER
NORFOLK, VIRGINIA 23510

objections to jury instructions to be made at or after the trial in order to preserve them for appellate review. No objection was made in accordance with those rules. North Carolina's Post-Conviction Hearing Act provided the exclusive grounds of state collateral review, id. at 1057 fn. 3. The court was authorized to deny a motion for a relief if the petitioner was in a position to adequately raise the ground or issue alleged in the petition for collateral review but did not do so or if the ground or issue was previously determined on the merits, unless since the time of such previous determination a retroactively effective change in the law controlling such issue had taken place. The court was, however, authorized to grant the petition even if the above circumstances pertained "in the interest of justice and for good cause shown", language almost identical to the Virginia Rule 5:21. The petitioner argued that he fell within "interest of justice and good cause shown" exception, but the Fourth Circuit ruled that that section was not in effect when the petitioner sought relief and was therefore inapplicable to his case.

VIII. CONCLUSION

For the reasons stated herein, the petitioner Frank Coppola should be given leave to proceed in forma pauperis, the petition for certiorari should be granted, and the decision of the Virginia Supreme Court reversed.

Respectfully submitted,

HOWELL, ANNINOS, DAUGHERTY & BROWN

808 Maritime Tower
Norfolk, Virginia 23510
(804) 623-7334

By: Augustus Anninos

By: J. Gray Lawrence, Jr.

LAW OFFICES OF
HOWELL, ANNINOS,
DAUGHERTY &
BROWN
808 MARITIME TOWER
NORFOLK, VIRGINIA 23510

Present: All the Justices

FRANK COPPOLA

-v- Record No. 801140

WARDEN OF THE VIRGINIA
STATE PENITENTIARY

PER CURIAM

September 11, 1981

FROM THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS
Henry D. Garnett, Judge

Frank Coppola was convicted in the trial court of one count of capital murder, two counts of robbery, one count of maiming, and one count of use or display of a firearm in the commission of a felony. His punishment was fixed at death for the capital murder and imprisonment for the other convictions, viz., life for each of the robberies, 20 years for the maiming, and one year for the use or display of a firearm in the commission of a felony.

We affirmed Coppola's conviction of capital murder and the imposition of the death sentence for reasons set forth in our opinion dated August 30, 1979. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797. On the same date, we affirmed his other convictions by denying his petition for appeal relating to those offenses. 220 Va. lxxvi. After we denied Coppola's petitions for rehearing on October 5, 1979, Coppola filed a petition in the United States Supreme Court for a writ of certiorari, and certiorari was denied by order entered February 19, 1980. Coppola v. Virginia, 444 U.S. 1103.

Coppola then filed in the trial court a petition for a writ of habeas corpus seeking, on the basis of numerous allegations therein stated, reversal of all his convictions, or "at a

minimum", commutation of his death sentence to imprisonment for life. On April 29, 1980, the date set for hearing, Coppola was permitted to amend his petition to include additional grounds for relief. One of his supplemental allegations was that Instruction 9, given without objection at trial, stating that "a man is taken to intend that which he does or which is the natural and necessary consequence of his own act", had been rendered unconstitutional by Sandstrom v. Montana, 442 U.S. 510, decided June 18, 1979. In Sandstrom, the Supreme Court held that an instruction, given over objection, that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" was unconstitutional because it could be construed to shift the burden of proof to the accused. After conducting a hearing on Coppola's amended petition, the trial court on that same day entered an order denying him any relief. We granted Coppola an appeal limited to questions as to the applicability of Sandstrom.

The dispositive question in this appeal is whether the failure of Coppola's counsel to interpose at trial a contemporaneous objection to Instruction 9 precludes reivew of the instruction at this time. We hold that it does. Rule 3A:23(c) requires that objections to instructions in a criminal case be made before the trial court instructs the jury unless the court grants leave to make objections at a later time. Rule 5:21 provides that error assigned to any ruling of the trial court will not be sustained on appeal unless objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Thus, upon Coppola's direct appeal, we invoked the preclusive provisions of Rule 5:21 as to issues not raised at trial relating to certain instructions given by the trial court in the sentencing proceeding that followed the determination of

guilt. 220 Va. at 254-55, 257 S.E.2d at 805. See Whitley v. Patterson, 204 Va. 36, 40, 129 S.E.2d 19, 22 (1963).

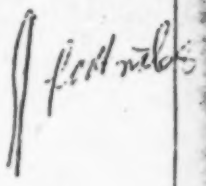
Coppola's counsel argued before us that he was under no duty to anticipate at trial that Sandstrom would subsequently be decided and thus had no reason to make a contemporaneous objection to Instruction 9. Sandstrom, however, was merely a further application of the principle that the burden rests and remains on the prosecution in a criminal case to prove beyond a reasonable doubt every element of the offense, and that the burden of persuasion may not be shifted to the accused by presumptions, as earlier enunciated in In re Winship, 397 U.S. 358, 364 (1970), and Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975), both decided long before Coppola's trial. See also Hodge v. Commonwealth, 217 Va. 338, 228 S.E.2d 692 (1976). Thus, defense counsel in Sandstrom, relying upon Mullaney and other cases already decided at that time, made a timely objection to the presumption instruction.

Moreover, although Sandstrom was decided before we had affirmed Coppola's conviction in his direct appeal to us, he made no effort to challenge Instruction 9 before this Court or the United States Supreme Court. Indeed, he first raised an issue as to the validity of the instruction approximately ten months after the Sandstrom decision.

In Hankerson v. North Carolina, 432 U.S. 233 (1977), where the Supreme Court ruled that Mullaney was fully retroactive, the Court rejected the argument that such a ruling would seriously impair the administration of justice, stating:

> Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in

> the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed.Rule Crim. Proc. 30.



432 U.S. at 244, n.8. (Emphasis added).

O'Connor v. Ohio, 385 U.S. 92 (1966), upon which Coppola relies, is distinguishable. There, the Supreme Court held that the Ohio contemporaneous-objection rule could not be invoked to bar the defendant from attacking for the first time on appeal, after Griffin v. California, 380 U.S. 609 (1965), had been decided, the prosecutor's comment at trial on his failure to testify. However, as emphasized in the opinion, the defendant in O'Connor was seeking review by the Supreme Court on direct appeal when Griffin was decided, and he raised the Griffin issue before his conviction was final. See O'Connor v. Ohio, 382 U.S. 286 (1965). In the present case, Coppola's appeal was pending when Sandstrom was decided, and although he had opportunity to do so, Coppola did not raise the Sandstrom issue before his conviction became final some eight months later.

Coppola could have made timely objection at trial to Instruction 9 and preserved the issue for appeal, as the defendant in Sandstrom did, but he did not do so. And, unlike the defendant in O'Connor, he did not raise the issue on direct appeal. We hold, therefore, that Coppola's failure to comply with Rules 3A:23(c) and 5:21 bars his attack on the instruction. Moreover, as objection could have been raised at trial and on direct appeal, it may not now be raised in a habeas corpus

proceeding. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

Having ruled that the procedural question is dispositive, we do not reach other questions relating to the effect, if any, of the decision in Sandstrom upon the granting of Instruction 9. We will affirm the judgment of the trial court dismissing the petition.

Affirmed.

RECEIVED
OCT 2 1981
HOWELL, ANNINOS
DAUGHERTY & BROWN

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of Septe[illegible], 1981.

Frank Coppola, Appellant,

against Record No. 801140
Circuit Court No. 137-G

Warden of the Virginia
State Penitentiary, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Newport News on the 29th day of April, 1980.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the appellee thirty dollars damages and the costs expended herein.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Allen L. Lacy
Clerk

VIRGINIA: In the Circuit Court for the City of Newport News, Tuesday, the 29th day of April, 1980.

PRESENT: The Honorable HENRY D. GARRETT, Judge.

FRANK COPPOLA : Petitioner

VS.

JAMES P. MITCHELL : Respondent.
Superintendant, etc.

O R D E R

This cause came on this day to be heard on the Petition for Habeas Corpus heretofore filed, and the amendment to said petition this day duly filed.

Whereupon, the Court considered argument of counsel for the petitioner and counsel for the Commonwealth, and after careful consideration thereof

It is ADJUDGED, ORDERED AND DECREED that the petition for Plenary Hearing on said Habeas Corpus petition is wholly without merit and accordingly is hereby denied,

It is FURTHER ADJUDGED, ORDERED AND DECREED that the petition to stay the execution of the Petitioner now set for May 2, 1980, be and the same is hereby denied, and this cause is dismissed.

And the record made by the Court Reporter of the proceedings herein is filed as part of the record in this case.

Enter

Henry D. Garrett, Judge

Seen and objected to:

J. Gray Turner, Jr.
Counsel for petitioner

A COPY, TESTE: H. J. Sturm, Jr., Clerk

By _____ D. C.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 16th *day of* January, 1981.

Frank Coppola, Appellant,

against Record No. 801140
Circuit Court No. 137-G

Warden of the Virginia State Penitentiary, Appellee.

From the Circuit Court of the City of Newport News

Upon the petition of Frank Coppola an appeal is awarded him from a judgment rendered by the Circuit Court of the City of Newport News on the 29th day of April, 1980, in a certain habeas corpus proceeding then therein depending, wherein Frank Coppola was petitioner and James P. Mitchell, Superintendent, etc., was respondent; no bond being required.

This appeal, however, is limited to the consideration of the following questions:

1. Whether Instruction No. 9 falls within the ambit of instructions prohibited by Sandstrom v. Montana, 442 U.S. 510 (1979).

2. Whether Sandstrom should be applied retroactively.

3. Whether counsel's failure to object to Instruction No. 9 at trial or on direct review should bar the petitioner's present challenge to that Instruction through a habeas petition. Rule 5:21; Compare Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8 (1977), with O'Connor v. Ohio, 385 U.S. 286 (1966).

4. Whether the granting of Instruction No. 9 was harmless error.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to the questions above set forth, and the briefs to be filed shall be limited to such discussion as is relevant to the questions upon which this appeal is awarded.

The petition for appeal is refused as to the remaining questions.

A Copy,

Teste:

Allen L. Lacy
Clerk

Opposition

RECEIVED
DEC 21 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-5687

FRANK COPPOLA,

Petitioner,

v.

WARDEN OF THE VIRGINIA
STATE PENITENTIARY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

ROBERT E. BRADENHAM, II
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
ARGUMENT	3
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

Cases

	Page
Chapman v. California, 386 U.S. 18 (1967)	4
Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979)	2, 3, 4, 5, 6, 7
Coppola v. Warden of the Virginia State Penitentiary, 222 Va. ___, ___ S.E.2d ___ (1981)	2
Dooley v. Sheffer, 572 F.2d 994 (4th Cir. 1978)	7
Goins v. Commonwealth, 218 Va. 285 237 S.E.2d 136 (1977)	4
Gore v. Leeke, 605 F.2d 741 (4th Cir. 1979)	7
Griffin v. California, 380 U.S. 609 (1965)	6
Hale v. Commonwealth, 165 Va. 808 183 S.E. 180 (1936)	5
Hankerson v. North Carolina, 432 U.S. 233 (1977) n. 8.	7
Harrington v. California, 395 U.S. 250 (1969)	4
Mullaney v. Wilbur, 421 U.S. 684 (1975)	5, 6, 7
Nelson v. Commonwealth, 153 Va. 909 150 S.E. 407 (1929)	5
O'Connor v. Ohio, 385 U.S. 92 (1966)	6
Sandstrom v. Montana, 442 U.S. 510 (1979)	2, 3, 4, 5, 6
Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978)	7
Slayton v. Parrigan, 215 Va. 27 205 S.E.2d 680 (1974)	6
Smith v. Commonwealth, 165 Va. 776, 182 S.E. 124 (1935)	5
Wainwright v. Sykes, 433 U.S. 72 (1977)	7
Whitley v. Patterson, 204 Va. 36, 129 S.E.2d 19 (1963)	5
Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980)	7
In re Winship, 397 U.S. 358 (1970)	5, 6

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-5687

FRANK COPPOLA,

Petitioner,

v.

WARDEN OF THE VIRGINIA
STATE PENITENTIARY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia, entered in this case on September 11, 1981, not be granted.

OPINION BELOW

The opinion of the Supreme Court of Virginia on September 11, 1981, is set forth in the Petition for a Writ of Certiorari.

JURISDICTION

Petitioner claims that jurisdiction is founded upon Rule 17(b) and (c), Rules of the Supreme Court.

QUESTIONS PRESENTED

I. WHETHER SANDSTROM v. MONTANA, 442 U.S. 510 (1979) SHOULD BE APPLIED RETROACTIVELY.

II. WHETHER COUNSEL'S FAILURE TO OBJECT TO INSTRUCTION NO. 9 AT TRIAL OR ON DIRECT REVIEW SHOULD BAR THE PETITIONER'S PRESENT CHALLENGE TO THAT INSTRUCTION THROUGH A HABEAS PETITION.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of the City of Newport News, Virginia on October 27, 1978 of capital murder during the commission of armed robbery and sentenced to death. He appealed his conviction to the Supreme Court of Virginia by way of direct appeal. The conviction was affirmed by written opinion of August 30, 1979. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979). A petition for rehearing was denied by order of October 5, 1979 and the United States Supreme Court denied the Petition for a Writ of Certiorari on February 19, 1980.

A Petition for a Writ of Habeas Corpus was filed in the Circuit Court of the City of Newport News, Virginia, which was dismissed on April 29, 1980. The Supreme Court of Virginia affirmed this judgment by written opinion of September 11, 1981. Coppola v. Warden of the Virginia State Penitentiary, 222 Va. ___, ___, ___S.E.2d ___ (1981).

STATEMENT OF THE FACTS

At the trial in the Circuit Court of the City of Newport News, Virginia, Instruction No. 9 was given to the jury without any objection by his defense counsel. The decision of the

Supreme Court of Virginia was limited to the consideration of the propriety of this instruction and the effect of the contemporaneous-objection rule.

ARGUMENT

In Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), the following jury instruction was given by the trial court, without objection:

> Instruction No. 9.
>
> The Court instructs the jury that a man is taken to intend that which he does, or which is the natural and necessary consequences of his own act.

The petitioner claims that this instruction is violative of the due process requirement enunciated by Sandstrom v. Montana, 442 U.S. 510 (1979), which held the following jury instruction unconstitutional:

> The law presumes that a person intends the ordinary consequences of his voluntary acts.

Instruction No. 9 is similar to the Sandstrom instruction, but was not relevant to the defense as in Sandstrom, since the criminal intent to kill the victim was not an issue in the Coppola case, only the identity of the assailant. The undisputed evidence in Coppola left no doubt that capital murder was clearly the intent of the perpetrators. Coppola, 220 Va. at 246-7, 257 S.E.2d at 800.

In contrast, the defendant in Sandstrom admitted killing the victim, but claimed that he did not do so "purposely or knowingly." Sandstrom, 442 U.S. at 512. Thus, the criminal intent of the defendant was "the lone element of the offense

at issue" in the defense's argument for a conviction of a lesser crime. Sandstrom, 442 U.S. at 520-1. Since a jury could conclude from this instruction that Sandstrom had the burden of persuasion to prove that he lacked the requisite mental state, the United States Supreme Court held that it violated the Fourteenth Amendment due process requirement that the prosecution prove every element of a criminal offense beyond a reasonable doubt. Sandstrom, 442 U.S. at 524. Unlike Coppola, the Sandstrom instruction was a crucial issue to the defense, which they demonstrated by a timely objection to this jury charge. Sandstrom, 442 U.S. at 513.

Instruction No. 9 in Coppola was not essential to the prosecution nor the defense, since the criminal intent of the assailants was not in question, only their identity. The defense never contended that the criminal act lacked the requisite criminal intent to constitute capital murder, but only that Coppola was innocent of any wrongdoing. This instruction was superfluous and had no effect on the case, which was obvious by the failure to object.

If Instruction No. 9 was improperly given, in spite of no objection, it was harmless beyond a reasonable doubt, since the requisite capital murder intent was not at issue. See Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967); Goins v. Commonwealth, 218 Va. 285, 288, 237 S.E.2d 136, 138 (1977). The classification of criminal culpability was essential in Sandstrom to ascertain the level of

the offense, but this was not a factor in the capital murder described in Coppola.

The retroactivity of the Sandstrom instruction is not a necessary consideration, since the defense in Coppola did not object to Instruction No. 9 in clear violation of Rules 5:21 and 3A:23(c) of the Virginia Supreme Court Rules. The Supreme Court of Virginia has consistently interpreted these Rules, together with their predecessors, as requiring a contemporaneous objection to a trial court's instructions. See Whitley v. Patterson, 204 Va. 36, 129 S.E.2d 19 (1963); Hale v. Commonwealth, 165 Va. 808, 183 S.E. 180 (1936); Smith v. Commonwealth, 165 Va. 776, 182 S.E. 124 (1935); Nelson v. Commonwealth, 153 Va. 909, 150 S.E. 407 (1929).

In Sandstrom, the basis for the objection to that instruction was the impermissible shift in the burden of persuasion to the defendant through that jury charge. This legal concept was in existance at the time of the Coppola trial through Mullaney v. Wilbur, 421 U.S. 684 (1975) and In re Winship, 397 U.S. 358 (1970). It should be noted that the trial counsel in Sandstrom made a timely objection to that instruction using these cases as precedent. Sandstrom, 442 U.S. at 513. Since the holding in Sandstrom for that instruction was not a new legal revelation, the attorneys in Coppola could have likewise made a timely objection based on these well-accepted cases in existance at the time of trial. Therefore, retroactive consideration of the Sandstrom instruction is not necessary since Sandstrom was not a new concept and thus, Instruction No. 9 could have been objected to at trial.

The United States Supreme Court in O'Connor v. Ohio, 385 U.S. 92 (1966) excused the defendant's failure to object to a totally new legal axiom (prosecutor commenting on a defendant's failure to testify), because the defendant could not be "charged with anticipating" the Griffin v. California, 380 U.S. 609 (1965) decision. O'Connor, 385 U.S. at 93. In contrast, the attorneys in Coppola were "charged" with knowing the decisions in Mullaney and Winship, the predecessors of Sandstrom.

Further, trial counsel could have raised the Sandstrom argument on appeal (decided on August 30, 1979) and at rehearing (decided on October 5, 1979), since both Coppola decisions were subsequent to Sandstrom (decided on June 18, 1979). Because this objection could have been raised and adjudicated at trial and on appeal, the petitioner may not raise this claim in a state habeas corpus proceeding. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

The focus of the decision from the Supreme Court of Virginia on September 11, 1981 was to enforce the contemporaneous-objection rule in order to prevent dilatory objections to jury instructions long after conviction. In deciding the retroactive effect of Mullaney, the United States Supreme Court suggested that the enforcement by the States of the contemporaneous-objection rule would preclude review of an instruction which was not objected to:

> "Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as

> respondent asserts. If the validity of such burden-shifting presumptions were as well-settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See e.g., Fed. Rule Crim. Proc. 30.

Hankerson v. North Carolina, 432 U.S. 233, 244 (1977), n. 8. See Mullaney, 421 U.S. at 704, n. *.

By enforcing Rules 5:21 and 3A:23(c), the Supreme Court of Virginia contributed to finality in criminal litigation by again holding that timely objections must be made to jury instructions. The Supreme Court of the United States has previously exemplified this same objective in Wainwright v. Sykes, 433 U.S. 72 (1977), by holding that Federal habeas corpus review of constitutional claims is precluded when a defendant fails to make a timely objection in accordance with a state's contemporaneous-objection rule. See also Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980); Gore v. Leeke, 605 F.2d 741 (4th Cir. 1979); Dooley v. Sheffer, 572 F.2d 994 (4th Cir. 1978); Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978).

Therefore, in the interest of promoting finality in criminal litigation, this Court should bar review of Instruction No. 9 in Coppola because of the failure to make a timely objection at trial as required by Virginia Procedure.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

Robert E. Bradenham II

ROBERT E. BRADENHAM, II
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 1981, one copy of the foregoing Brief was mailed to Augustus Anninos, Esquire, 808 Maritime Tower, Norfolk, Virginia 23510, counsel for petitioner.

Robert E. Bradenham II

Robert E. Bradenham, II
Assistant Attorney General